NO. 20551

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DULAINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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JURISDICTIONAL STATEMENT

Appellant brought an action, for malpractice under the Federal Tort Claims Act, against the United States Government, in the United States District Court, Southern District of California [R. 2-6 incl. entitled "Complaint . . ."]. 1/ Appellant claimed that the District Court had jurisdiction under 28 U.S.C. §1346(b). It is the Government's position that, since there was a failure to comply with the Federal Tort Claims Act statute of limitations, which is a jurisdictional prerequisite, the District Court lacked jurisdiction to entertain the action. Hungerford v. United States, 307 F. 2d 99

1/ References to the Transcript of Record will be indicated "R". References to the Supplemental Transcript of Record will be indicated "S. R.". References to Appellant's Brief will be indicated by "Br.".

(9th Cir. 1962). The District Court granted Appellee's, Motion for Summary Judgment [R. 40] on the ground that the Federal Tort Claims Act two-year statute of limitations had run. Since the District Court's decision was final, this Court has jurisdiction to review said decision under 28 U. S. C. §1291.

STATEMENT OF THE CASE

A. Introduction.

The action is one for medical malpractice. The gravamen of the Complaint is that an operation performed on the Appellant at a Veterans Administration Hospital in September, 1956, was negligently performed resulting in personal injury to the Appellant. The Complaint was not filed until November 13, 1964 [R. 2-6 incl.].

B. Chronology of Pleadings.

On November 13, 1964, Appellant, Robert Dulaine, filed a Complaint in the above-captioned matter against the United States of America, under the Federal Tort Claims Act, 28 U. S. C. §1346(b) for damages resulting from malpractice [R. 2-6 incl.].

On February 24, 1965, Appellant filed Plaintiff's Answers to Request for Admissions [S. R.].

On March 5, 1965, Appellee filed an Answer to the Complaint [S. R.].

On April 29, 1965, Appellant filed Answers to Interrogatories [S. R.].

On July 16, 1965, Appellee filed a Motion for Summary Judgment and Memorandum of Points and Authorities, and Affidavit [R. 7, et seq.].

On August 18, 1965, Appellant filed his Opposition to Motion for Summary Judgment with Affidavits [R. 25, et seq.].

On August 24, 1965, the Court filed Findings of Fact and Conclusions of Law on Appellee's Motion for Summary Judgment [R. 36, et seq.] and based upon such Findings of Fact and Conclusions of Law granted Appellee's Motion for Summary Judgment [R. 40]. The Order granting Defendant's Motion for Summary Judgment was entered on August 25, 1965 [R. 40]. This appeal is instituted to review said Order [Br. 2].

ISSUES PRESENTED

1. Do Appellant's assertions in his Affidavit in Opposition to Appellee's Motion for Summary Judgment create a genuine material fact issue which would, therefore, have to be disposed of at a trial?

2. Does the recital of facts contained in the medical records in Appellee's Affidavit in support of Appellee's Motion for Summary Judgment [R. 7, et seq.] violate the hearsay rule?

3. Did the District Court rely on said alleged hearsay in granting Appellee's Motion for Summary Judgment?

SUMMARY OF ARGUMENT

Since Appellant was aware of each of the alleged acts of malpractice by May 19, 1960, his Complaint, which was not filed until November 13, 1964, was barred by the Federal Tort Claims Act two-year statute of limitations (28 U. S. C. §2401(b)).

Appellant's assertions pertaining to his being unaware of the malpractice [Br. 5-9 incl.] are either immaterial or too incredible to be accepted by reasonable minds, in view of other evidence in the record. Such assertions, therefore, do not create a genuine material fact issue.

Appellee's recital of the facts contained in the medical records in Appellee's Affidavit in support of Appellee's Motion for Summary Judgment [R. 22, et seq.] does not violate the hearsay rule because medical records constitute an exception to the hearsay rule. Furthermore, the Court did not rely on said medical records in its Conclusions of Law and Findings of Fact. Furthermore, Appellant waived any hearsay objections that he might have had by failing to object in the Court below.

ARGUMENT

I

ALLEGED ACTS OF MALPRACTICE

The particular acts of malpractice upon which the Complaint is based are set forth in Plaintiff's Answer to Defendant's Interrogatory No. 2 [Plaintiff's Answer to Defendant's Interrogatory No. 2, S. R.].

Plaintiff's first allegation is that the negligence consisted of an improper technique in performing an aortogram (a pre-operative procedure) resulting in the failure to diagnose a second aneurysm or fistula, one having admittedly been diagnosed [Plaintiff's Answer to Defendant's Interrogatory No. 2, S. R., and Plaintiff's March 26, 1957, letter, p. 3, Exhibit "A" to Request for Admission No. 1, S. R.]. Although Plaintiff in his Answer to said Interrogatory does not say that the reason why he is complaining of the defective aortogram is because of a failure to diagnose the second aneurysm or fistula, that would appear to be the reasonable inference [Plaintiff's March 26, 1957, letter, pp. 3 & 4, Exhibit "A" to Request for Admission No. 1, S. R.]. Said letter reveals that one fistula was discovered prior to the September, 1956, operation and that the second fistula was not discovered until said operation.

Appellant's second allegation of negligence involves the cutting of a rent in the common iliac vein and the ligation of the common iliac vein, the hypogastric vein, the external iliac vein,

and one of the large gluteal branches of the iliac vein [Plaintiff's Answer to Defendant's Interrogatory No. 2, S. R.].

Appellant's third allegation of negligence involves injury to the throat during surgery affecting his voice and speech [Plaintiff's Answer to Defendant's Interrogatory No. 2, S. R.].

All of the said alleged negligent acts occurred at or before the time the operation was performed in September of 1956 [Plaintiff's Answer to Defendant's Interrogatory No. 3, S. R. , and Plaintiff's Answer to Defendant's Interrogatory No. 2(g), S. R.].

II

APPELLANT WAS AWARE OF EACH NEGLIGENT ACT BY MAY 19, 1960.

Within a year after said operation of September, 1956, Appellant was aware of each act of alleged malpractice and of every adverse effect alleged to be a result thereof with the possible exception of the throat problem.

By March 26, 1957, Appellant was aware that there were two fistulas and that the aortogram had failed to disclose two fistulas [Appellant's letter of March 26, 1957, p. 3, Exhibit "A" to Request for Admission No. 1, S. R.].

By March 26, 1957, Appellant was aware that the main vein to the left leg had been cut and tied off [Appellant's March 26, 1957, letter, p. 4, Exhibit "A", cited supra, S. R. , and Appellant's June 6, 1957, letter, p. 3, Exhibit "C" to Request for Admission No.

3, S. R.]. A tying off of the main iliac vein necessarily involves a tying off of the other veins mentioned by Appellant as they are subsidiary to and lower than the main vein and dependent thereon [See Dorland's Illustrated Medical Dictionary, 23rd Edition, Plate XLIX].

By March 14, 1960, Appellant was aware of the alleged injuries to his throat [Appellant's March 14, 1960, letter, pp. 3 & 4, Exhibit "D" to Request for Admission No. 4, S. R.].

III

APPELLANT WAS AWARE OF ALL OF THE ADVERSE EFFECTS OF THE ALLEGED MALPRACTICE BY MAY 19, 1960.

By March 26, 1957, Appellant was aware of the adverse effects of the alleged acts of malpractice, and was, of course, aware of the underlying acts allegedly constituting malpractice. By March 26, 1957, Appellant was aware of the adverse effects involving the aforesaid main vein in the left leg, and was aware of the effects of the defective technique in performing the aortogram which resulted in the failure to diagnose the fistulas [Appellant's March 26, 1957, letter, pp. 3 & 4, Exhibit "A", cited supra, S. R., and Appellant's March 6, 1957, Application for Compensation, pp. 1 & 2, Exhibit "B" to Request for Admissions No. 2, S. R., and Appellant's June 6, 1957, letter, pp. 3 & 4, Exhibit "C" to Request for Admissions No. 3, S. R.].

At least by March 14, 1960, Appellant was aware of the alleged injuries to Appellant's throat [Appellant's March 14, 1960,

letter, pp. 3 & 4, Exhibit "D" to Request for Admissions No. 4, S. R.].

By May 19, 1960, Appellant had reached the firm conclusion that malpractice had taken place in connection with the said operation of September, 1956 [Appellant's May 19, 1960, letter, pp. 2 & 3, Exhibit "E" to Request for Admission No. 5, S. R.].

The Complaint herein was not filed until November 13, 1964 [R. 2].

IV

THE STATUTE OF LIMITATIONS COMMENCED TO RUN ON OR BEFORE MAY 19, 1960.

The two-year statute of limitations under the Federal Tort Claims Act (28 U. S. C. §2401(b)) began to run when the Appellant discovered, or, when in the exercise of reasonable diligence, Appellant should have discovered, the acts constituting the alleged malpractice.

Quinton v. United States, 304 F. 2d 234 (5th Cir. 1962);

Hungerford v. United States, 307 F. 2d 99 (9th Cir. 1962);

Brown v. United States, 353 F. 2d 578 (9th Cir. 1965).

It is, therefore, apparent that the statute of limitations commenced to run by May 19, 1960, and that the filing of the

Complaint on November 13, 1964, was untimely.

V

REFUTATION OF APPELLANT'S CLAIMS OF ERROR.

A. Appellant's Hearsay Objection.

Appellant complains that the Affidavit of Morton H. Boren in support of Appellee's Motion for Summary Judgment [R. 22, et seq.] reciting facts contained in Appellant's medical records, contained hearsay statements which should not have been considered in determining a Summary Judgment Motion [Br. 4].

The Findings of Fact [R. 36, et seq.] did not rely upon Boren's aforesaid Affidavit. The Findings of Fact were based entirely upon Appellant's pleadings and documents [R. 36, et seq.].

Furthermore, medical records come within an exception to the hearsay rule under the Business Records Rule, 28 U.S.C. §1732. See McCormick on Evidence, Section 290, pp. 609, et seq. Also see Rule 44, Federal Rules of Civil Procedure which establishes that an official record is an exception to the hearsay rule. The medical records in the instant case are Veterans Administration Records and are, therefore, official records.

Since the record fails to disclose a hearsay objection to the said Affidavit, such an objection has been waived and cannot be raised for the first time on an appeal. See McCormick on Evidence,

B. Appellant's Assertions Do Not Create Genuine Material Fact Issues.

Appellant argues [Br. 5-9 incl.] that there were sufficient facts stated in Appellant's Affidavit opposing Appellee's Motion for Summary Judgment to raise a genuine material issue of fact, and, therefore, the granting of Appellee's Motion for Summary Judgment, was erroneous. Appellant has placed in his brief those portions of Appellant's Affidavit in opposition to Appellee's Motion for Summary Judgment which Appellant argues raised genuine material fact issues [Br. 5-9 incl.].

An analysis in detail of Appellant's aforesaid assertions establishes that no genuine issue as to any material fact exists in the instant case. Appellant's aforesaid assertions pertaining to his being unaware of the malpractice are conclusionary or immaterial or incredible. Such assertions, therefore, do not raise an issue of credibility which should be heard at a trial. There is, therefore, in the instant case, no genuine issue of material fact.

To defeat a summary judgment movant, who has otherwise sustained his burden, a party opposing a motion must present facts proper in form, not conclusions. Dickheiser v. Pennsylvania R. R. (E. D. Pa. 1945), 9 F. R. Serv. 15a21, Case 1, 5 F. R. D. 5, aff'd. (3rd Cir. 1946), 155 F. 2d 266, cert. denied (1947), 329 U. S. 808, 67 S. Ct. 620, 91 L. Ed. 689.

The opposing party's facts must be material. Nahtel Corp. v. West Virginia Pulp & Paper Co. (2nd Cir. 1944), 141 F. 2d 1. The facts must be of a substantial nature, Bidler & Bookmyer v. Universal Ins. Co. (2nd Cir. 1943), 134 F. 2d 828, 831; not fanciful, Dewey v. Clark (D. C. Cir. 1950), 180 F. 2d 766, 772; nor frivolous, De Luca v. Atlantic Ref. Co. (2nd Cir. 1949), 176 F. 2d 421, 423; nor gauzy, Sabin v. Home Owners Loan Corp. (10th Cir. 1945), 151 F.2d 541, 542, cert. denied (1946), 328 U. S. 840, 66 S. Ct. 1011, 90 L. Ed. 1615; nor merely casting suspicion, Banco de Espana v. Federal Reserve Bank (S. D. N. Y. 1939), 28 F. Supp. 958, 973, aff'd. (2nd Cir. 1940), 114 F. 2d 438.

> "To proceed to Summary Judgment, it is not sufficient than that the Judge may not credit testimony pro-offered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force." Whitaker v. Coleman (5th Cir. 1940), 115 F. 2d 305, 306.

"The above test has been applied and often quoted. Evidence, then, that is too incredible to be accepted by reasonable minds does not raise an issue of credibility. Conversely, if the evidence is such that the jury would not be at liberty to disbelieve it, no issue of credibility is present." Moore's Manual -- Federal Practice and Procedure, Moore and Vestal, 1962 1 Vol. Ed., p. 1295; Camerlin v. New York Cent. R. R. (1st Cir. 1952), 199 F.2d 698; Minor v. Washington Terminal Co. (D. C. Cir. 1950), 180 F. 2d 10, 12; Surkin v. Charteris (5th Cir. 1952), 197 F. 2d 77.

Appellant's first such assertion is that he was unaware of malpractice involving the rent in the main vein involving his left leg until late November, 1962 [Br. 5]. Such an assertion is incredible. By March 26, 1957, Appellant knew that the main vein, during the September 1956 operation had been "inadvertently cut . . . causing many complications" [March 26, 1957, letter, p. 4, Exhibit "A", cited supra]. By March 6, 1957, Appellant knew that the vein was ligated and that thromboflabitis had set in [Appellant's March 6, 1957, Application for Compensation, p. 1, Exhibit "B", cited supra, S. R.]. By June 6, 1957, Appellant realized that the rent and ligation resulted in his having a bad left leg, and that the

Veterans Administration owed him a settlement for the rent and the ligation [Appellant's June 6, 1957, letter, pp. 1, 3 & 4 Exhibit "C", cited supra, S. R.]. By May 19, 1960, Appellant reached the firm conclusion that malpractice was perpetrated in connection with the rent and ligation of the main vein affecting his left leg [Appellant's May 19, 1960, letter, p. 3, Exhibit "E", cited supra, S. R., and Appellant's November 13, 1960, letter, pp. 1 & 2, Exhibit "G" to Request for Admission No. 7, S. R.].

Appellant's next assertion is that he didn't know that facts were omitted in his medical records until 1964 [Br. 5 & 6, beginning with last paragraph on p. 5]. Such an assertion is immaterial. The dispositive issue is Appellant's awareness of malpractice. If Appellant were aware of the acts of malpractice, he was aware of the acts of malpractice. The mere fact of omissions in medical records does not refute the fact that Appellant was aware.

Appellant's next assertion deals with omissions in a document pertaining to foreign bodies [Br. 6]. Such an assertion is immaterial for the reasons stated above. An omission in a document does not prove Appellant's lack of awareness of malpractice. Appellant's assertions regarding omissions do not refute other evidence establishing Appellant's awareness of malpractice.

Appellant's next assertion again deals with an omission to list facts concerning the rent in his left leg [Br. 6]. Appellant also complains that the Government concealed certain facts pertaining to said left leg [Br. 6]. Again such assertions are immaterial as they do not refute evidence establishing that Appellant was aware

of malpractice by 1960. As set forth above, Appellant reached the firm conclusion that malpractice had been perpetrated in connection with his left leg by May 19, 1960.[Appellant's May 19, 1960, letter, pp. 2 & 3, Exhibit "E", cited supra]. Since Appellee has established that Appellant was aware of malpractice perpetrated in connection with his left leg, the Government's alleged concealment of facts and omissions to list do not show Appellant's lack of awareness, and Appellant's assertions are therefore immaterial. If Appellant were aware of malpractice, then he was aware, regardless of the Government's alleged concealments and omissions to list.

Appellant's next assertion again deals with omissions in documents and the concealment of a malpractice form [Br. 7]. Such assertions are again immaterial because they do not refute the fact that Appellant possessed knowledge of alleged malpractice by 1960.

Appellant's next assertion is that he did not discover the improper technique in performing an aortogram until 1962 [Br. 8]. The reasonable implication appears to be that the improper aortogram resulted in a failure to diagnose aneuyerisms or fistulas and that that is why Appellant is complaining of the improper aortogram [Appellant's March 26, 1957, letter, pp. 3 & 4, Exhibit "A", cited supra, and Plaintiff's Answer to Defendant's Interrogatory No. 2, S. R.]. Such an assertion is incredible in view of other evidence establishing that Appellant was aware of said improper technique and its consequences by March 26, 1957 [Appellant's March 26, 1957, letter, p. 3, Exhibit "A", cited supra, and Appellant's

June 6, 1957, letter, pp. 2 & 3, Exhibit "C", cited supra, S. R.].

Appellant's next assertion deals with the Government's alleged failure to diagnose aneurysms or fistulas. Appellant was aware of the existence of the aneurysms or fistulas and of the fact that they should have been diagnosed and repaired by March 26, 1957 [Appellant's March 26, 1957, letter, p. 4, Exhibit "A", cited supra, S. R.]. Appellant states in said March 26, 1957, letter that the fistulas should have been repaired and, inferentially, diagnosed in 1945 when he was first wounded. [Appellant's March 26, 1957, letter, p. 4, Exhibit "A", cited supra, S. R.]. Appellant states that the fistulas were instead not repaired until October, 1956 [Appellant's March 6, 1957, Application for Compensation, p. 2, Exhibit "B", cited supra, S. R.]. Appellant was, therefore, aware of the alleged malpractice pertaining to the fistulas by March 26, 1957.

Appellant's next assertion deals with his left leg and the failure of the Veterans Administration to admit that ligations were made, until 1963 [Br. 8]. Such an assertion is immaterial. The Government's failure to make an admission does not refute Appellant's awareness of malpractice by 1960. It has already been established that Appellant was aware of the alleged malpractice concerning his left leg by May 19, 1960 [Appellant's May 19, 1960, letter, pp. 2 & 3, Exhibit "E", cited supra, S. R.].

Appellant's last assertion is the conclusionary statement that he was unaware of malpractice until the latter part of November, 1962 [Br. 9]. Such an assertion is incredible in view of other

evidence. To again refer to such evidence would be unnecessary and repetitious.

Justice Cardoza's statement bears repetition:

> "The very object of a Motion for Summary Judgment is to separate what is formal or pretended . . . from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial." Richard v. Credit Susse (1926), 242 N. Y. 346, 152 N. E. 110.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Order of the District Court granting Appellee's Motion for Summary Judgment and denying the relief prayed for in Appellant's Complaint, should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ M. Morton Freilich

M. MORTON FREILICH